IN THE

PREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

FILED

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CLERK

No. 222

ELMIRA KATZENSTEIN, Appellant

vs.

JOHN A. SANDS, Appellee

ITED ON QUESTIONS ASKED AND SUBMITTED TO THE PREME COURT OF THE UNITED STATES BY AND FROM HE CIRCUIT COURT OF APPEALS OF THE EIGHTH JU- CIAL CIRCUIT, SITTING IN ST. LOUIS, AND THEY ARE FILED ON APPEAL FROM THE CIRCUIT COURT OF THE NITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

RIEF AND ARGUMENT OF APPELLEE.

JOHN H. KING, Fisher, S. D.

el for Appellee, who is the Plaintiff in the original suit.

B. DAVIS, of Sioux City, Iowa,

Associate Counsel.

21602

IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

EQUITY.

No. 233

ELMIRA KNEPPER, Appellant

vs.

JOHN A. SANDS, Appellee

CERTIFIED ON QUESTIONS ASKED AND SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES BY AND FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH JUDICIAL CIRCUIT, SITTING IN ST. LOUIS, AND THEY ARE TRIED ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT FOR APPELLEE.

After a full hearing on the trial of the case and oral argument made to the Court and printed briefs on both sides submitted, the Circuit Court of Appeals united in asking the following questions of the Supreme Court of the United States and duly certified the same to-wit:

And the said circuit court of appeals for the eighth circuit further certifies that the following questions of law, among others, arise and are presented by the assignment of errors in this case; that the decision thereof is indespensable to a correct decision of the cause; and that to that end it desires the instruction of the Supreme Court upon the following questions and propositions of law, to-wit:

First. In view of the provisions of the act of Congress of May 12, 1864, by virtue of which the land in controversy was granted to the State of Iowa, did the action which was subsequently taken in manner and form aforesid, by the governor and legislature of State of Iowa, operate as a final adjustment of the grant so far as the Sioux City & St. Paul Railroad Company was concerned and by virtue of its being so adjusted, exempt or except the grant in question from the provisions of the adjustment act of March 3, 1887?

Second. In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through it governor and legislature, can Elmira Knepper, the appellant, be esteemed a purchaser in good faith or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of March 3, 1887, as against John A. Sands, the appellee, who was in open possession of the land in controversy and had erected valuable improvements thereon in manner and form aforesaid when said purchase was made?

In witness whereof the undersigned judges, holding the said United States Circuit Court of Appeals for the eighth Circuit, have hereunto set their hands this 25th day of February, A. D., 1903, at St. Louis, Missouri, and ordered that

the foregoing certificate be filed in said United States circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Elmira Knepper, appellant, claims this land in question by reason of the purchase thereof from the Sioux City and St. Paul Railroad Co., under a contract made in 1887 and after the passage of the act of March 3rd, 1887 under and by virtue of the fourth section of said act.

The first section of this act provides that the secretary of the interior shall proceed to adjust the unadjusted land grants of the different railroad companies, and where he finds lands have been sold or settled upon the rights of the different classes of settlers or purchasers are preserved—are provided therein by paying the government price to the United States and receiving a confirmatory patent for said land.

The fourth section of said act is where patents to the lands have been issued to the railroad company or for their use and benefit, erroneously or otherwise, the purchasers who in good faith have purchased, shall have the right to pay to the United States the government price for said land and upon proper proof of the same shall receive a confirmatory patent therefor.

Section five is where they have purchased land in good faith to which the railroad company had no patent, but which land was situated or located opposite to or contiguous

with the constructed portion of the road. But with the further proviso that no purchase made after 1882 of the contiguous land (where no patent was issued to the company) should be valid. These lands were located opposite to the constructed portion of the road but being purchased long after the railroad company had received all the land they had earned and had not received the patent, therefore and long after 1882 they could not be claimed under this section, so if claimed at all must be claimed under section four.

In this action John A. Sands is the homestead claimant, settling on said land after the state had conveyed the same back to the United States and before the pretended purchase was made by appellant of the railroad company, basing his claim on the continuous settlement, improvement and cultivation, fully complying with the homestead laws of the United States, notwithstanding the interior department awarded a confirmatory patent to the appellee under the pretended purchase of appellant from the railroad company as stated, and he petitions the court in equity to set aside this patent, setting up all the facts and alleging that the secretary of the interior erred in his construction of the law, and that under the law the secretary of the interior had no right to issue the confirmatory patent to the purchaser and should have under the law awarded the patent to plaintiff and appellant and asking that the titles be decreed in him. To this petition appellant demurred, the Circuit Court overruled the demurrer and he appealed to the Court of Appeals and they ask of this court the answer to certain questions heretofore quoted.

Our first contention is that the act of March 3rd, 1887 does not apply to these lands; because the first section of the act

of March 3, 1887; provides that the secretary of the interior shall proceed to adjust the unadjusted land grants in the United States and then the provisions following apply to the condition of the affairs which he finds in these unadjusted land grants, and this land grant having been adjusted long prior to the passage of the act, was therefore not applicable thereto.

Second.—The claim of the appellant is made under section four of the act of March 3, 1887, on what is called patented lands to the railroad company and these lands were never patented to the railroad company and no condition existed to bring them within the provisions of section four of said act.

Third.—Our principal and main contention is that, under the granting act of May 12, 1864, that it fully conferred upon the State of Iowa through its legislature and officers, the full authority, the absolute right and it became its duty in this case to adjust the land grant to this company that the act gave to the State of Iowa, the absolute control of said lands, the right of granting to the railroad company the right of adjustment, the right and authority of forfeiture, right of resumption and the right to re-grant the land to another railroad company in case of the failure of the first to perform within the ten years' limit, and the right to use the land in any manner consistent with the granting act of congress so as to secure the building of the road within five years more.

And in this connection we allege that the grant to the State of Iowa to secure the building of this road and the McGregor and Missouri River railroad company west to an intersection therewith, all in the same grant, *was unlike any other grant* ever made by congress to any other railroad company

or any other state, in this: *That in all the other grants* upon the failure of the railroad company to build the road in the time limit fixed by congress, that the lands reverted to the United States.

WHEREAS: In this case, the time limit fixed by the United States for the grantee company to build the road was ten years, and when that time expired, the land did not revert to the *United States but reverted directly to the State of Iowa;* and congress gave to the state this right of resumption which carried with it the right of adjustment and the authority to use the land with any other company or in any manner the state saw fit, to secure the building of the road. And in this connection our contention is, that the State of Iowa, by and through its governor and proper officers and by and through the legislature of the state, fully adjusted this grant to this company and conveyed all of the lands that the railroad company had earned to it and emphatically refused to convey any more lands to the said company, although the company demanded the same and the refusal of the state by the governor was publicly proclaimed by and through the land department of the State of Iowa, by and through the message of the governor to the said legislature and that the said legislature declared a forfeiture of said lands fully resumed the same and so far as the Sioux City and St. Paul Railway company was concerned conveyed them back by an act of the legislature to the United States, all done many years prior to the passage of the Act of March 3, 1887 and many years prior to the pretended contract of sale made by the railroad company to the appellant for this land and after the passage of the Forfeiture and Resumption Act of the legislature of Iowa which also declared in said act to be for the

purpose of enabling settlers to go upon said land and claim the same under the homestead law and after this the appellee settled on said land and said settlement and occupation was continuous, open and notorious and was prior to the purchase or pretended purchase of this land by the appellant of the railroad company.

Our contention is that this action of the State of Iowa under the authority given them by Congress in the granting act of May 12, 1864, concluded the railroad company and the parties purchasing from them and all others, that the pretended contract of sale made after all this had been done, was and is absolutely void and not only without authority of law, but contrary to law.

And we contend that even in the absence of a homestead claimant for said land, that the Secretary of the Interior of the United States would not only be justified in refusing a confirmatory patent therein to the appellee, but that the executive department of the government *has no authority of law* by which they can issue this patent to the claimant, claiming to purchase of the railroad company for this or any of these lands under any provision of the act of March 3, 1887, or any other provision of law. That there is no law whatever justifying the claim of the appellee and with the permission of the Court, we will present the third contention first.

Third. We think a brief review of the granting act of 1864 and the act of March 3, 1887, together with the action of the duly constituted authorities of the State of Iowa and the legislature thereof in relation to these lands will fully satisfy the court of the correctness of our contention.

The McGregor Western Railway Co. was named in the granting act of 1864 but the Sioux City Railroad Co. was not

named, but the State named it in the act of the legislature in granting the land to it and the following is the provision in relation to the reversion in the act of 1864 after providing that the lands granted shall be subject to the disposal of the legislature of Iowa for the purposes aforesaid and no other.

Then following: "That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall *revert to the state of Iowa* for the purpose of securing the completion of the said road within such time not to exceed five years and upon such terms as the state shall determine and provided further that said lands shall not in any manner be disposed of or encumbered except as the same was patented under the provision of this act."

Then comes the provision that should the State fail to complete said road within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

Now under this authority given to the State of Iowa by this act of Congress, the State through its legislature exercised their right and authority after the expiration of ten years wherein the McGregor Western Railroad Co., afterwards McGregor and Missouri River Railroad Co., had failed to complete their road within the time limit and the time limit of ten years had expired, and the road had only been built to Algona, whereas it should have been built to its intersection in O'Brien Co., at or near Sheldon, Iowa, the State by its governor and land department adjusted the grant, prepared a list of the lands unearned and unpatented to the railroad company declared a forfeiture of the lands and rights of the company and re-granted the same to another

railroad company, to-wit: The Chicago, Milwaukee & St. Paul Co., who built the road and secured the lands from the State within the five years limit provided for in the act of Congress.

For this action of the Iowa legislature, see chapter 21, page 18 of the laws of Iowa for 1878, 12th General Assembly, wherein it was recited:

"That as the McGregor Western Railroad Company, known as the McGregor & Missouri River Railroad Company, had failed to comply with the provisions of the act of the 12th General Assembly, etc., therefore.

"Be it enacted. Section 1. That all lands or rights to lands heretofore granted the McGregor Railroad Company, be and are absolutely and entirely resumed to the state of Iowa."

Then section 2 granted all these lands to the Chicago, Milwaukee & St. Paul Railroad Company on the conditions therein named, to-wit: The provisions of the granting act of 1864.

Now, no one has ever questioned the authority of the State, the legislature thereof, to adjust the amount of lands that the McGregor Railroad Company was to receive and to declare the forfeiture of the balance and to resume the lands and regrant the same. Not only has this title never been questioned, but has directly been recognized and approved by the supreme court of the United States.

I say, however, that this title has never been questioned; but I can hardly say that, because it was questioned by homestead claimants, and while we have not found that any action has been taken by the supreme court of the United States, yet the title was duly confirmed in a number of cases tried in O'Brien county, and the supreme court of the state

of Iowa found that the Chicago, Milwaukee & St. Paul Railroad Company had a good title to this land.

Now, the only title it could have received was by and through the action of the State through its proper officers adjusting the grant, of the Iowa legislature declaring the forfeiture, resuming the land, and regranting it to another railroad company, all done by and through the operations of the officers of the state and the action of the legislature of the state of Iowa. It was the only source by which the Milwaukee & St. Paul Railway Company ever had, or ever could have received a single acre of this land. In fact, the court held this title to be good. After the United States government and held this title to be good, and after the United States and the state of Iowa had parted with thousands of acres of land in this manner, had built up a precedent, and the law had been fully recognized, now certain parties come to this court and question the authority of the state, on the action of the state and the validity of the state in a similar case under the same grant but to the Sioux City company. There is no basis upon which this claim by the defendants can be made to even live, let alone be executed and the title confirmed in any manner but by ignoring, setting aside and declaring inoperative without authority of law the action the state in adjusting the grant, of the Iowa legislature in declaring the Sioux City & St. Paul Railway Company's grant forfeited, resuming the same, and reconveying it to the United States. You must violate and ignore the granting Act of 1864 and the action of the legislature and only constituted authority of the state of Iowa in order to sustain the contentions of the appellant.

While it is true this land was patented to the state of Iowa in 1873, the patent read "for the use and benefit of

the Sioux City & St. Paul Railway Company," but the state holding the title from the United States could make no possible difference. The state was charged with the responsibility of not giving it to the railroad company only as it had earned it.

Now it is not contended by counsel that a patent was ever issued by the State of Iowa to the railroad company for any of these lands in question but they undertook to say that by reason of the erroneous issuing of the patent to the State of Iowa which is conceded to be erroneous and was issued contrary to law and although never conveyed by the State of Iowa to said railroad company but the State had absolutely refused to convey the same. Yet by reason of the formal use of words in that erroneous patent which I presume was a form made to apply on other grants where the reversion was direct to the United States, they used the term to the State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company under the granting act of 1864.

It is barely possible that a court of equity might hold that if a purchase had been made while the state held the title which used these words, for the use and benefit of the Sioux City Co. before the State had openly, notoriously and publicly refused the railroad company to patent the same to them giving the reason of their refusal, and before the open and notorious fact that the railroad company had failed to earn the lands and were not entitled to them and would not be allowed to receive them and before the Legislature of the State of Iowa had openly and notoriously passed and published its statute declaring the forfeiture and resumption of these lands to the state, that a court of equi y might have considered the question. I do not think, however, they could ever

concede it by reason of the direct injuction in the granting act which absolutely prohibited the sale or incumbrance of any of these lands until they had been earned and patented to the company so that I think the court would have found that the purchaser would have been bound to have taken notice of the fact of the recorded conveyances of the State of Iowa of the number of acres of land received by the railroad company to be the full sum to which it was entitled and which they had earned, as the granting act specifically stated the number of acres they should receive for each ten miles constructed. So that I do not believe even then there would have been any equity whatever in the case or that any wise or learned court would have so found.

If all of these lands had been given to the state of Iowa and conveyed by the United States to the state of Iowa immediately upon the passage of this grant, the law would not have been a particle different, nor the rights of the parties changed in any respect, nor in any manner enlarged than it would have been if it had never been patented to the state. No man can claim under the law that he was in any manner misled by it, because the act absolutely provided that the railroad company should never receive it until they had earned it and in this case the state authorities asserted they never would convey it. No man can claim under the law that he was in any manner misled by it, because the act provided that the railroad company should never receive it from the state, that the governor should never give it nor certify it until the railroad company was entitled to it; it provided that the state legislature had to dispose of the land, and at the time and during the fifteen years of the life of the grant, the state was the only authority under the act of congress that had any right to dispose of the land and the

state was the only authority that had right to adjust the grant, to declare a forfeiture and resume the grant and regrant the same to another company if it saw fit, as it did with the McGregor company, and it also took definite and direct action as to this land and took it out of the operation of the grant or the subsequent act of March 3, 1887.

Whatever may have been the practice or the custom of the officers of the United States land department, as to writing deeds or patents, the authority absolutely rested with the state to say whether the railroad company had built the road, and whether they were entitled to the land.

The United States transferred that authority to the state, and while it may not have been intended by the members of congress or the law itself to prohibit the government of the United States from exercising some supervisory power to prevent the squandering of the lands unjustly, and while it may not have been intended that the government of the United States should in fact convey this land to the state until these railroads had been built and the fact certified by the governor, yet the state had its duty to perform, its decision to make. The mistake of the United States in deeding or conveying the land to the state of Iowa, lands which the railroad company had not earned, was not a mistake of the state, and it could not under the law inure to the benefit of the railroads, nor any one purchasing from them either directly or indirectly.

There is a vast deal of difference between the authority imposed in this grant to secure the building of this road and the other road named in the grant, McGregor Western Railway Company, and that which gave to the state of Iowa the grants for the Burlington and Rock Island grants, that

gave to the state of Michigan the Sault Saint Marie, and to Wisconsin and Minnesota their various grants.

In none of these cases, nor in any other that ever existed, was the right to regrant to another railroad company to secure the building of the road designated after the grant was forfeited by the first.

I would therefore ask the Court to notice carefully the difference in the reading of these other grants. My contention is that this grant to the state of Iowa to secure the building of these roads, placed the state in the same position for the time being, as the United States, as to these other grants with just as full power as the United States had in these other cases, and that this action of the Iowa legislature had as full force and effect as could an act of congress if it had not designated this power to the state of Iowa, and this deed to the state never had been made, and that it was, so far as the law of the case was concerned, the original grantor, and that it mattered not what the United States might have done in error or otherwise as to premature deeding to the state, the law was so framed and must be so construed that this action of the state legislature must control this matter so far as this case is concerned, was conclusive and binding on all parties, as long as that action of the state legislature was within the limits of the authority granted it. That the words in the patent to the state of Iowa "For the use and benefit of the Sioux City & St. Paul Railway Co.," was without any authority of law, and void except possibly a description designation. Not only the railroad companies, but all the world was bound to take notice of the law in relation thereto and the subsequent action of the state authorities and the legislation thereof.

Suppose the railroad had been constructed with wooden rails on practically no grading so as to be useless; the state would have been perfectly justified in refusing the conveyance.

There must be read into this patent the statutes of the United States which say, and must be construed to say:

And provided further that the state of Iowa has full authority to declare the forfeiture, to adjust this grant, resume the land and grant the land to another company, or comply with this grant in any manner it may see fit to secure the building and completion of said road, if the original grantee fails in ten years to construct as provided therein. That is what the patent of 1873 in law says; that is the way in law and in equity this patent reads; any other construction is an unjust construction; any other construction is a harsh construction; any other construction changes the meaning of the English language, and changes the law of this case, and would be an injustice to the grant; any other construction of the law would be contrary to public policy, because it would cheat the government of the United States, and would cheat the state of Iowa and the people thereof, and fail to secure the public improvement intended, and defeat the object of the grant, and deprive settlers on the public domain of the use thereof, and give an opportunity for speculation not intended.

The law is clear and demands but one meaning; there is no reason in the world why it should be construed in any other way than this way. As to construction of statutes see

Sutherland on Statutory Construction, pp. 235 and 237.
Vol. 23, Am. Eng. Enc. of Law, pp. 319, 320 and 326.

It is possible that in the authority given in the other acts of congress wherein these lands were made subject to dis-

posal of the legislature, and in case of failure to revert to the United States, but no reversion to the state, that some declaration of resumption and forfeiture may have been allowable and proper for the information of the United States from some authorized source, that the United States by its proper officers might proceed to attend to the matter, as the state itself was only interested in securing the completion of its internal improvements and benefits derived therefrom, and executing the trust conferred, and although it is possible that their declaratton of forfeiture might not have been good and that the resumption might not have been complete as to these other grants without the affirmative action of the United States, and the reversion never have taken place until the United States acted. But in this case the state of Iowa stood as the actual grantor and was the interested party. It was in fact the grantor to the railroad company, and the beneficiary under the grant to the state, might be one company for a part of the time and another company some other time. The land might have been disposed of in some other way, just so that it was used for the securing of the building of this road, and under that grant undoubtedly the state might have built the railroad itself, but this was not the case in any other grants ever made by any other states, or in favor of any other companies.

There is in this case not even the contention that the state of Iowa was wrong in its conclusion of the law, or finding of the fact. The supreme court of the United States in its decision, October, 1895, settled all that. If the railroad company had had any equity whatever in this matter the court would have give it to them, but they had none, and there never was a minute's time that these lands were ever erroneously or otherwise conveyed to or set aside to the Sioux

City & St. Paul Ry. Co., nor for their use and benefit, so that any intelligent, honest man could have been misled.

Further, that these facts which we plead are not demurrable, and that to concede them to be true concedes that the defendants have no case.

This granting act of 1864 provided that the lands should only be given the railroad company as they earned them, and in the latter part of section 4 the following language is used:

"And provided further, that said lands shall not be in any manner disposed of or incumbered, except as the same are patented under the provisions of this act."

Now, to contend that the patenting to the state of Iowa of these lands under the provisions of this act, is a patenting to the company within section 4, is simply a misconstruction of the language. It is out of harmony with the equity and law of the case. It is a construction that it is not warranted by law. The provisions are that they should not be patented to the railroad company until they earned the same; the patenting to the state was not the patenting to the railroad company; the state had to certify to and patent it then to the company and they not only never did it but emphatically refused to do it.

Now, this sale of said lands by the railroad company was a sale which was prohibited until the lands were patented to the railroad company, which could not be done until they had earned them and they never earned them, and they never were patented to them erroneously or otherwise. The Court says the grounds of the forfeiture of the contract are immaterial if the subject of the contract was not to be contracted for

Vol. 3. Am. Eng. Enc. of Law, 872: "A contract founded

upon the transaction prohibited by the statute cannot be maintained."

A valid existing contract must be in existence at the time or this right to land cannot be maintained. See cases cited, p. 872.

Now, it is not whether a mistake was made, not whether the railroad company sold lands to which they were not entitled, but in this case there was a positive prohibition against the sale. All contracts made in violation of the expressed statutory provisions are inoperative and void.

Penn vs. Bourman, 102 Ill., pp. 523 to 528.

Parties ought to know what these laws are, for the law will not lend its support to a claim founded on its own violation.

Copel vs. Hall, Wal., 542.

Craig vs. Missouri, 4th Peters, 410.

Armstrong vs. Toler, 11th Wheaton,258.

Doland vs. Carr, 125th U. S., 610 to 630.

Bank vs. Merrick, 14th Mass., 322.

Hunt vs. Knickerbocker, 5th John., N. Y. Rep., 327.

Swan et al. vs. Miller, 1st S. Rep., 65.

In this case the Court says: "That it is the elementary law that purchasers must take notice of the recital in the deed and of the law constituting their chain of title."

This grant was to be applied exclusively to the building of the railroad, and the land to be used for any other purpose was expressly prohibited. Purchasers and all parties were bound to take notice.

See Wade on Notices, Secs.45 and 47.

4th Hare, p. 147.

7th Hare, p. 191.

18th Beaver, p. 85.

30th Beaver, p. 465.

Stewart vs. Matheny, 66th Miss., 21.

Jelison vs. Halloran, 44th Minn., p. 129.

Also see Wade on Notices, Secs. 11 and 12.

Simmons et al. vs. Dorand, 12th U. S.; Supreme Court Rep., 439.

Wherein discussing bona fide purchases, Fuller, chief justice, quotes from Burwell's Administrator vs. Fauber, 21 Gratt, Vir. Rep., pp. 446 to 463.

Wherein it says purchasers are bound not only by actual notice, but have no right to shut their eyes and ears to the inlet of information. See cases cited.

The granting act and the acts of the Iowa legislature would give notice to the world of the condition of the title. I have no question about this whatever; the court and everybody else must take notice of it.

The laws of the state are in force without notice, and all are charged with notice of their existence and rights arising thereunder.

Vol. 16, Am. Eng. Enc., 807.

Now, returning to the original proposition and connected with the rights of the state and duties under the granting act, and touching upon the question of

FORFEITURE, ADJUSTMENT AND RESUMPTION,

I have presented to the court the precedent cited of the acts of the state legislature, relative to the adjustment, forfeiture and resumption of the grant to the McGregor road, and the regrant to the Chicago, Milwaukee & St. Paul Railroad Company. The governor in his message to the legislature of 1882 recited his refusal to comply with the request of Sioux City

& St. Paul Railway Company to convey the land to them, and his full reason why, reciting the failure of the Sioux City & St. Paul Railroad Company to build the roads in accordance with the grant, and recomending action thereon which the legislature took. Read act 18 general assembly.

Now, for the purpose of this argument, it becomes entirely immaterial whether the state ever gave it back to the United States, or whether it ever gave it to any other railroad company. The only thing we are concerned in is, did it declare a forteiture of this land? Did the state adjust the grant? Did it resume the unearned lands?

If it did this, the further act of reconveyance back to the United States is entirely an immaterial matter. Now the declaration of the governor in his official capacity to the legislature of the state in his regular biennial message must be accepted as a proper statement of facts, as he was the authorized executive head of the government of Iowa. His message is set out, and we file herewith a book containing his message, which is found in the first part of the book, Governor Sherman's message being in the latter part, and all printed by authority of law.

The legislature enacted and passed chapter 107 plead and heretofore referred to. As we have said that the state of Iowa through this land department, which was then in charge of the secretary of the state, J. A. T. Hull, afterward lieutenant governor and now a member of congress, wherein he made his report to the top of page 89 the exact status of these lands in question. This same list had been prepared as the records show many years before published in the report of the land department, but we use this list for convenence.

The second column gives the number of acres certified to the railroad company by the state, and the third column gives the number of acres withheld from the railroad company and the counties in which it is situated, which is 85,457 and 41-100 acres. This was and has ever since remained the adjustment of the Sioux City & St. Paul land grant under the act of March 12, 1864, and has never been and never will be changed.

It will be remembered and noticed that in this 85,000 and odd acres that the Chicago, Milwaukee & St. Paul Railway Company had claimed as their lands, by reason of its completed construction, the whole of the grant in the overlapping limits which the Sioux City & St. Paul disputed, and which the Supreme Court of the United States decreed that each company should have a moiety and which took away from this 85,000 acres a little over 37,000 acres; I have not the exact figures before me. Then there were the 26,000 acres certified back to the government of the United States in Plymouth and Woodbury counties and the balance of the lands, about 21,000 acres, in litigation, but no more lands were ever conveyed to the railroad company, nor any other lands than those enumerated in this adjusted and withheld list. No other list has ever existed to my knowledge or information that I have ever been able to find, except this list.

This contention of the Chicago M & St. Paul Railroad Company that they were entitled to these lands if the Sioux City company was not, was the cause of the second clause of the act of the Iowa legislature of 1884 requesting the governor to withhold certificate to the lands in O'Brien and Dickenson counties.

The state of Iowa had the books, the papers, the number

of the lands it had given to the railroad company, and nobody else had them or could get them, except through the state of Iowa. It is a reasonable and proper construction to put upon the law. The railroad company brought suit against the governor to compel him to convey, and then withdrew the suit. See page 52 of the report of the secretary of state, land department of 1885, which is filed herewith, and the governor says that in 1878 the company requested him to certify and patent the remainder of these lands, amounting between 85,000 or 90,000 acres of land, and he declined to do so and requested the legislature to take proper action thereon.

It need not therefore matter that a secretary of the interior or that a commissioner of the general land office, or that any other person having been used to other grants of land, to other states for other railroads different from this, that the United States itself was concerned in, and had to make the adjustment and the state was merely acting as a trustee without authority, only to do certain things which were done, and not to resume and adjust and forfeit in case it was not done, as in this case, should speak of this grant as unadjusted and inadvertently say to the commissioner of the general land office to adjust this grant, etc., but the adjustment had in fact all been made. It is possible the government had not been informed of it, but it had been made. Now all this had been done prior to the passage of the act of March 3, 1887, and therefore does not apply to these lands.

Therefore my contention then is, in connection with the conclusion of the other proposition that by reason of the first and second sections of the act of March 3, 1887, wherein it

says that the secretary of the interior is authorized and directed to adjust certain land grants so far unadjusted, and that if it shall appear upon the completion of such adjustment that so and so has been done; that if at the time of the passage of the act the adjustment had been made and completed, that this act did not apply to land grants already adjusted, and that this was one of them.

Now, while these letters and papers may show that these officers were in some doubt about the construction of the law, yet nowhere is there a doubt cast about the fact of the number of sections of 10 miles each of road that the company had constructed, the amount of land they had received and the amount of land withheld, nor has there been any question made that the list of withheld lands, published by the secretary of the state before the governor, at the time of his annual message in 1882, and at the time of the passage of the act or the legislature in 1882 adjusting the land, was the only list and has ever remained the only adjusted list, and that that list of withheld lands was the list that the supreme court decided October, 1895, that the railroad company had no title to nor interest in, and altogether was a complete adjustment of the grant and has ever since so remained and this adjustment was made in 1878.

"HAVE BEEN SOLD"

Now, then, there is one other proposition in connection with the construction of this act of March 3, 1887, whether it can apply to these lands in question notwithstanding these other conclusive grounds which I have recited. It is a question that I will not argue long, but I want to be well understood in relation thereto, and that is the words "have been sold" in section 4 of the act of March 3, 1887.

It seems to me that while a close construction would bar sales made after the passage of the act, yet a very liberal construction would not extend them beyond the adjustment of the grant.

Now, "have been" is in the past tense; "have been" in the future, notwithstanding the interior department commenced in an ex parte case in Wisconsin, where there was a transfer from one railroad company to another of its rights and interests, after the passages of the act before an adjustment of it and it sort of took this land by succession, where the case was not argued nor presented, the interior department inadvertently established a precedent, and since then has held that contracts made after the passage of the law were good. The learned assistant attorney general, Mr. Vandeventer, in commenting upon it in the trial of one of these cases before the interior department, said that if he had had the original construction of this language he might have construed it differently, and intimated that he would, but that a precedent had been established for him.

Now if these sales could have been confirmed and the land given to the purchaser on contracts made after the passage of this act and after the adjustment then let us reason for a moment what kind of a condition we would be in.

If this position is taken to be true, then this act, instead of correcting the evil complained of, instead of its preventing the squandering of the public domain, instead of its preventing these lands from going into the hands of speculators, and instead of its preserving the public domain according to the long, well established line of public policies in the United States for actual settlers; it means to give it to the speculator, it means to put in the power of these railroad

companies and any purchasers they might find the power to sell nearly all if not all of the lands. It was intended by the act of March 3, 1887 to preserve the lands and not squander them.

To construe this act of March 3, 1887, in such a way as to permit sales after the passage of this act and after the adjustment of the lands would be to nullify it. On this subject see,

Farnsworth vs. Railroad Company, 93 U. S. Sup. Court, p. 56.

Farmers' Loan & Trust Company vs. Railroad Company 39 Fed. R., p. 151, and cases cited.

Schulenburg vs. Harriman, 21 Wall., p. 44.

Lau Ou Ben vs. United States, 144 U. S., p. 4750.

Sutherland on Stat. Const. Supra.

This court has never decided the railroad company could sell these lands after an adjustment had been made; they have indicated they might be sold after the passage before an adjustment had been made.

As bearing a little upon the questions involved in this case, I will call the attention of the court to the case of the Sioux City & St. Paul Railway Company vs. The County of Osceola, 43 Ia. R., pp. 321 and 322.

Also cases of

Bowen & Sleeper vs. Bisland, 41 N. W. R., p. 161.

Railroad vs. Countryman, 43 Iowa, p. 181.

Cases in 139 U. S. Sup. Court, p. 377.

Swan vs. Miller, 1st S. R., pp. 65 to 69.

Second Pomeroy's Edition on Equity Jurisprudence, Sec. 745.

Johnson vs. Townsley, 13 Woll., p. 732.

Defanback vs. Hawke, 115 U. S., p. 302.
Clarke vs. Des Moines, 17th Ia., p. 199.
159 U. S. Sup. Court, p. 371.

TRESPASS.

I do not deem it necessary to talk about the question of trespass. Under the conditions of this case I cannot see that there is anything in this question.

Even if the case of Superior Ship Canal Co. et. al. vs. Cunningham in the 155th Supreme Court Reports, page 103, especially page 113, had not been decided, it has been a long standing rule of the interior department that in the case of claimants for public lands, while they acquired no rights as against the United States, yet as between other claimants the time of their settlements in good faith would be taken into consideration, and their prior rights preserved, as against individuals; that the United States alone could decide this question, and they have decided it, and recognized it in thirty-five of these cases by granting patents for settlement, against subsequent purchasers of the railroads. In fact, the United States government has entirely ignored this question of trespass; there is nothing in it.

There are a great many other questions in this case; my associate counsel will fully present them. The prominent features may be summed up:

First, that this land grant was adjusted by due operations of law, and the acts of the officers and the legislature of the state of Iowa, long before the passage of this act of March 3, 1887, and under section 1, only unadjusted grants are affected by this act, and therefore this act does not apply.

Second, that the contracts are void, being contrary to the granting act, because the railroad company were prohibited

from selling the lands until they had earned them and they were patented to them, and they never were patented to them and the 4th section of the act of March 3, does not apply to this land, neither had they ever earned them.

Third, that the action of the governor and officers of the state of Iowa in conveying to the railroad company all the lands they had earned and to which they were entitled for the road constructed and publically and officially refusing to convey any more lands and assign their reason therefore that the road was not entitled to any more making a final adjustment of the grant so far as the Sioux City company was concerned by the lists published and proclaimed of the unearned and unpatented lands, and the final action of the Iowa legislature in declaring the lands forfeited and fully resumed and the subsequent act of the legislature in conveying them back to the United States, all of which the state had the right to do and which was its duty to do, concluded the railroad company and those who might subsequently purchrse of them after all of this was done and all would be bound thereby and those claiming by virtue of said contract to sell would have no rights and that the land in time became public and unappropriated land and finally subject to homestead entry.

And the plaintiff and appellee herein should maintain his suit under his petition filed and the patent issued to the appellant contrary to law be set aside and the title decreed in John A. Sands, the plaintiff and appellee.

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